



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 115 OF 2015

SAMUEL KINYANJI GICHAMBA.....PLAINTIFF

VERSUS

KALENJIN ENTERPRISES LIMITED.....1ST DEFENDANT

ZACHARY KEBOGA MASIOGA..... 2ND DEFENDANT

GRACE ANNE CHEMUTAI.....3RD DEFENDANT

JUDGMENT

1. The plaintiff commenced proceedings herein on 20th April 2015 pursuant to plaint dated 15th April 2015. In the plaint, it is averred that the plaintiff bought shares in the 1st defendant company from one Chirchir A. Kiplibwop as well as Kiplibwop's interest in plot No. 888 measuring half an acre which Kiplibwop had been allocated by the 1st defendant. The plot was later given a new number being Nakuru Municipality Block 29/920. Dispute applying to the 1st defendant for a title around the year 2002 and paying for it, the 1st defendant did not process the title but instead amended the map such that the parcel known as Nakuru Municipality Block 29/920 was subdivided and registered as Nakuru Municipality Block 29/1450 and 1451 in the names of the 2nd and 3rd defendants. The plaintiff further avers that despite all these changes in the registration details of the land, he has been in actual occupation of the land since the year 1976. Accordingly, the plaintiff sought judgment against the defendant jointly and severally for the following:

a) An order for the cancellation of the title deed issued to the 2nd and 3rd defendant in respect of Nakuru Municipality Block 29/1450 and 1451.

b) In the alternative a declaration that the plaintiff is entitled to the land by adverse possession.

c) Costs of the suit.

2. Despite being served with summons to enter appearance, the defendants never entered appearance nor filed any defence. Further, despite being served with hearing notices, the defendants never attended or participated in the hearing.

3. The plaintiff did not testify. Instead, his son Stephen Mungai Kinyanjui testified as PW1 after which the plaintiff's case was closed. He told the court that the plaintiff bought a plot measuring half an acre from Chirchir Kiplibwop on 5th July 1976. The sale was arranged through Kamere & Co. Advocates. He produced a copy of a letter dated 5th July 1976 from Kiplibwop to the said advocates as plaintiff's exhibit 1. The plot had been allocated to Kiplibwop by the 1st defendant. The plaintiff was issued with a share certificate a copy of which he produced as plaintiff's exhibit 2. The plaintiff took possession in 1976 and erected a building on the plot. He applied for a title deed but was not issued with one. The plaintiff moved to the Land Disputes Tribunal praying that he be issued with a title deed. The tribunal rendered a decision dated 28th August 2007 wherein it agreed with the plaintiff. The 1st defendant was represented at the tribunal hearing by its director. PW1 produced a copy of the tribunal's decision dated 28th August 2007 as plaintiff's exhibit 3. The decision was registered at Nakuru Chief Magistrate's Court as Land Dispute No. 84 of 2007 and the court issued an order on 30th June 2008. He produced a copy of the order as plaintiff's exhibit 4. Subsequently, a title deed was issued to the plaintiff in respect of plot No. Nakuru Municipality Block 29/920 following the court order. By the time the title was issued, the 1st defendant had amended the map such that Nakuru Municipality Block 29/920 did not measure the same as the plot the plaintiff had bought. The plaintiff had bought a half acre but Nakuru Municipality Block 29/920 was measuring 50 by 100 and was at a different location.

4. PW1 further testified that the land that he and the plaintiff occupy was instead registered in favour of Grace Anne Chemutai the 3rd

defendant and Zachary Keboga Masioga the 2nd defendant. The plaintiff confirmed this through Certificates of Search dated 17th March 2015 in respect of Nakuru Municipality Block 29/1450 and in respect of Nakuru Municipality Block 29/1451. He produced the two Certificates of Search as plaintiff's exhibits 5 (A) and 5 (B) respectively. The plaintiff also bought the area map dated 28th March 2002 from the lands registry. It confirmed that the map had been amended. It shows that the plot where the plaintiff has occupied and constructed upon is now known as 1450 and 1451. He produced the map as plaintiff's exhibit 6.

5. PW1 also told the court that since 1976 the plaintiff has had peaceful occupation of the plot for 41 years save for the year 2014 when some people sent by 2nd defendant came to cut down his maize. The 3rd defendant has however never gone to the land. The plaintiff has never been taken to any court by the defendants. He further testified that the defendants committed fraud so as to obtain registration of plot numbers 1450 and 1451. He urged the court to order that the title deeds for plot 1450 and 1451 be cancelled.

6. The plaintiff filed written submissions on 8th December 2017. Counsel for the plaintiff submitted that it was not necessary for the plaintiff to testify and that the testimony of PW1 was adequate. The case of Stamm –vs- Tiwi Beach Hotel Ltd EALR [1995 – 98] 2EA 378 was cited in support of this argument. Counsel further submitted that the plaintiff's evidence and case was not challenged. He urged the court to find that the 2nd and 3rd defendants acquired the property fraudulently and to cancel their title deeds. He further urged the court to order rectification of the register to reflect the plaintiff as the owner of the suit properties.

7. I have carefully considered the pleadings, the evidence and the submissions tendered. The defendants have not offered any evidence to challenge the plaintiff's case. Nevertheless, the burden remains upon the plaintiff to establish his case.

8. As to whether or not the plaintiff needed to testify in support of his case, I agree with counsel that all that is required is admissible evidence. It may come from the plaintiff alone, from the plaintiff and other witnesses or from a witness even if the plaintiff does not himself testify. In this case, even though the plaintiff did not testify, admissible evidence in support of the plaintiff's case was tendered by PW1.

9. The plaintiff's case is that on 5th July 1976, he bought Mr. Chirchir A. Kiplibwop's shares in the 1st defendant company and the plot known as plot No. 888 located in Rhonda and measuring half on acre. The plot was later given a new number. When the 1st defendant failed to process and issue title deed in his favour, he moved to the Land Disputes Tribunal in claim No. 21 of 2007. The tribunal found in his favour and ordered the directors of the 1st defendant to process issuance of title deeds in favour of the plaintiff. The tribunal's findings were registered in Nakuru Chief Magistrate's Court Land Dispute No. 84 of 2007 and a decree was issued on 10th December 2007.

10. Arising from the decree, the plaintiff proceeded and obtained title in respect of the plot. The plaintiff did not however produce a copy of the title for Nakuru Municipality Block 29/920 or even a Certificate of Official Search in respect thereof. All we have is the testimony of PW1 as regards ownership of the plot.

11. The plaintiff's case is further that by the time he obtained title, the 1st defendant had amended the map such that Nakuru Municipality Block 29/920 was no longer measuring the half an acre which the plaintiff bought in 1976. Further, it was at a different location. PW1 testified that the land that the plaintiff is occupying was instead registered as two different parcels being Nakuru Municipality Block 29/1450 in the name of the 2nd defendant and Nakuru Municipality Block 29/1451 in the name of the 3rd defendant. Certificates of Search were produced in support of this testimony. I have perused the two Certificates of Search and I can see that the 2nd defendant became registered proprietor on 28th January 2010 and the 3rd defendant became registered proprietor 16th February 2010.

12. The plaintiff did not produce any certified copy of the register or green card in respect of Nakuru Municipality Block 29/920, Nakuru Municipality Block 29/1450 and Nakuru Municipality Block 29/1451. It is therefore impossible for the court to ascertain the dates when the registers for these parcels were opened at the land registry, the history of any entries made in the register as well as the relevant registry map sheet number. In the absence of evidence from the register tying the registry index map that was produced by PW1 to the suit properties, I am unable to verify the plaintiff's case to the effect that the 2nd and 3rd defendants' plots are the same plot occupied by the plaintiff.

13. Further, the plaintiff's case and evidence is that he has occupied the plot continuously since 1976. However, I note from the land dispute proceedings as well as the decree issued on 10th September 2007 in Chief Magistrate's Nakuru Land Dispute No. 84 of 2007 that it is stated therein that there was a person known as Jane Wangui who was in occupation and who was ordered to vacate. The plaintiff did not offer any evidence on whether the said person is still in occupation and if not, when she did vacate.

14. Under **Section 25** of the **Land Registration Act**, the rights of the 2nd and 3rd defendants as registered proprietors are laid down as follows:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

15. Further, under **Section 26** of the said Act, the 2nd and 3rd defendants' Certificate of title is to be held as conclusive proof of their ownership and is not subject to challenge except on grounds of fraud or misrepresentation to which they are proven to have been parties or where the titles have been acquired illegally, unprocedurally or through a corrupt scheme. On the basis of the evidence tendered, I am not satisfied that any of the conditions set under section 26 of the Act have been met.

16. In the circumstances, I dismiss the plaintiff's case. No order on costs.

Dated, signed and delivered in open court at Nakuru this 6th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Andama holding brief for Mr. Githui for the plaintiff

No appearance for the defendants

Court Assistants: Gichaba & Lotkomoi